



## **BILLING CODE 754501**

### **NATIONAL LABOR RELATIONS BOARD**

#### **29 CFR Part 102**

#### **Rule Exempting an Amended System of Records From Certain Provisions of the Privacy Act**

**AGENCY:** National Labor Relations Board.

**ACTION:** Final rule; correction.

**SUMMARY:** On February 24, 2017, the National Labor Relations Board published in the Federal Register a comprehensive amendment of its procedural regulations that revised a section in its entirety, but inadvertently failed to include two paragraphs. This document corrects those regulations to include the paragraphs that were inadvertently repealed.

**DATES:** Effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Prem Aburvasamy, Senior Agency Official for Privacy, National Labor Relations Board, 1015 Half Street, S.E., Washington, DC 20570-0001, (202) 273-3733, [privacy@nrlrb.gov](mailto:privacy@nrlrb.gov).

**SUPPLEMENTARY INFORMATION:** On November 21, 2016, the National Labor Relations Board amended one of its systems of records, NLRB-17, Personnel Security Records, in accordance with the Privacy Act of 1974, 5 U.S.C. 552a. Pursuant to subsections (k)(1), (2), (3), (5), (6), and (7) of the Privacy Act, the Board included within Section 102.119, additional paragraphs (o) and (p), exempting portions of the amended system of records (NLRB-17) from subsections (c)(3), (d),

(e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I) and (f) of the Privacy Act. This amendment was published in the *Federal Register* on November 21, 2016. Three months later, on February 24, 2017, the National Labor Relations Board published in the *Federal Register* a comprehensive amendment of its procedural regulations that replaced § 102.119 in its entirety. In the comprehensive amendment, the Board inadvertently failed to include § 102.119, paragraphs (o) and (p). This document corrects the regulations that were published February 24, 2017, to include the paragraphs that were inadvertently repealed.

## **List of Subjects in 29 CFR Part 102**

### **Privacy, Reporting and Recordkeeping Requirements**

Accordingly, 29 CFR Part 102 is corrected by making the following amendments:

## **PART 102—RULES AND REGULATIONS, SERIES 8**

1. The authority citation for part 102 continues to read as follows:

Authority: Sections 1, 6, National Labor Relations Act (29 U.S.C. 151, 156).

Section 102.117 also issued under section 552(a)(4)(A) of the Freedom of Information Act, as amended (5 U.S.C. 552(a)(4)(A)), and Section 102.117a also issued under section 552a(j) and (k) of the Privacy Act of 1974 (5 U.S.C. 552a(j) and (k)). Sections 102.143 through 102.155 also issued under section 504(c)(1) of the Equal Access to Justice Act, as amended (5 U.S.C. 504(c)(1)).

## **Subpart K—Records and Information**

2. In § 102.119, paragraphs (o) and (p) are added to read as follows:

**§ 102.119 Privacy Act Regulations: notification as to whether a system of records contains records pertaining to requesting individuals; requests for**

**access to records, amendment of requests; fees for document duplication;  
files and records exempted from certain Privacy Act requirements.**

\* \* \* \* \*

(o) Pursuant to 5 U.S.C. 552a(k)(1), (2), (3), (5), (6), and (7) of the Privacy Act, the system of records maintained by the NLRB containing Personnel Security Records shall be exempted from the provisions of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f) insofar as the system may contain:

(1) Records properly classified pursuant to an Executive Order, within the meaning of section 552(b)(1);

(2) Investigatory material compiled for law enforcement purposes other than material within the scope of 5 U.S.C. 552a(j)(2);

(3) Information maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18 of the U.S. Code;

(4) Investigatory material compiled solely for the purpose of determining suitability, eligibility or qualifications for Federal civilian employment and Federal contact or access to classified information;

(5) Testing and examination materials used for a personnel investigation for employment or promotion in the Federal service;

(6) Evaluation materials, compiled during the course of a personnel investigation, that are used solely to determine potential for promotion in the armed services.

(p) The Privacy Act exemptions contained in paragraph (o) of this section are justified for the following reasons:

(1)(i) 5 U.S.C. 552a(c)(3) requires an agency to make the accounting of each disclosure of records available to the individual named in the record at his/her request. These accountings must state the date, nature, and purpose of each disclosure of a record and the name and address of the recipient. 5 U.S.C. 552a(d) requires an agency to permit an individual to gain access to records pertaining to him/her, to request amendment to such records, to request a review of an agency decision not to amend such records, and to contest the information contained in such records.

(ii) Personnel investigations may contain properly classified information which pertains to national defense and foreign policy obtained from another Federal agency. Application of exemption 5 U.S.C 552a(k)(1) is necessary to preclude an individual's access to and amendment of such classified information under 5 U.S.C. 552a(d).

(iii) Personnel investigations may contain investigatory material compiled for law enforcement purposes other than material within the scope of 5 U.S.C. 552a(j)(2). Application of exemption 5 U.S.C 552a(k)(2) is necessary to preclude an individual's access to or amendment of such records under 5 U.S.C. 552a(c)(3) and (d).

(iv) Personnel investigations may also contain information obtained from another Federal agency that relates to providing protective services to the President of the United States or other individuals pursuant to 18 U.S.C. 3056. Application of

exemption 5 U.S.C 552a(k)(3) is necessary to preclude an individual's access to and amendment of such records under 5 U.S.C. 552a(d).

(v) Exemption 5 U.S.C 552a(k)(5) is claimed with respect to the requirements of 5 U.S.C. 552a(c)(3) and (d) because this system contains investigatory material compiled solely for determining suitability, eligibility, and qualifications for Federal employment. To the extent that the disclosure of material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence, the applicability of exemption 5 U.S.C 552a(k)(5) will be required to honor promises of confidentiality should an individual request access to or amendment of the record, or access to the accounting of disclosures of the record. Similarly, personnel investigations may contain evaluation material used to determine potential for promotion in the armed services. Application of exemption 5 U.S.C 552a(k)(7) is necessary to the extent that the disclosure of data would compromise the anonymity of a source under an express promise that the identity of the source would be held in confidence, or, prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence. Both of these exemptions are necessary to safeguard the integrity of background investigations by minimizing the threat of harm to confidential sources, witnesses, and law enforcement personnel. Additionally, these exemptions reduce the risks of improper influencing of sources, the destruction of evidence, and the fabrication of testimony.

(vi) All information in this system that meets the criteria articulated in exemption 5 U.S.C 552a(k)(6) is exempt from the requirements of 5 U.S.C. 552a(d), relating to access to and amendment of records by an individual. This exemption is claimed because portions of this system relate to testing or examining materials used solely to determine individual qualifications for appointment or promotion to the Federal service. Access to or amendment to this information by an individual would compromise the objectivity and fairness of the testing or examining process.

(2) 5 U.S.C. 552a(e)(1) requires an agency to maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required by statute or by executive order of the President. This requirement could foreclose investigators from acquiring or receiving information the relevance and necessity of which is not readily apparent and could only be ascertained after a complete review and evaluation of all the evidence. This system of records is exempt from this requirement because in the course of personnel background investigations, the accuracy of information obtained or introduced occasionally may be unclear, or the information may not be strictly relevant or necessary to favorably or unfavorably adjudicate a specific investigation at a specific point in time. However, in the interests of protecting the public trust and national security, it is appropriate to retain all information that may aid in establishing patterns in such areas as criminal conduct, alcohol and drug use, financial dishonesty, allegiance, foreign preference or influence, and psychological conditions, that are relevant to future personnel security or suitability determinations.

(3) 5 U.S.C. 552a(e)(4)(G) and (H) require an agency to publish a Federal Register notice concerning its procedures for notifying an individual, at his/her request, if the system of records contains a record pertaining to him/her, how to gain access to such a record and how to contest its content. Since this system of records is being exempted from subsection (f) of the Privacy Act, concerning agency rules, and subsection (d) of the Privacy Act, concerning access to records, these requirements are inapplicable to the extent that this system of records will be exempt from subsections (f) and (d) of the Privacy Act. Although the system would be exempt from these requirements, the NLRB has published information concerning its notification, access, and contest procedures because, under certain circumstances, it may be appropriate for a subject to have access to a portion of that individual's records in this system of records.

(4) 5 U.S.C. 552a(e)(4)(I) requires an agency to publish a Federal Register notice concerning the categories of sources of records in the system of records. Exemption from this provision is necessary to protect the confidentiality of the sources of information, to protect the privacy and physical safety of confidential sources and witnesses, and to avoid the disclosure of investigative techniques and procedures. Although the system will be exempt from this requirement, the agency has published source information in the accompanying notice in broad generic terms.

(5) 5 U.S.C. 552a(f) requires an agency to promulgate rules which shall establish procedures whereby an individual can be notified in response to a request if any system of records named by the individual contains a record

pertaining to that individual. The application of this provision could compromise the progress of an investigation concerning the suitability, eligibility, and fitness for service of applicants for Federal employment and impede a prompt assessment of the appropriate access to the Agency's facilities. Although this system would be exempt from the requirements of subsection (f) of the Privacy Act, the Agency has promulgated rules which establish agency procedures because, under certain circumstances, it could be appropriate for an individual to have access to all or a portion of that individual's records in this system of records.

Dated: December 9, 2019.

Roxanne L. Rothschild,

Executive Secretary

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